A

Girish Chandra a/l Hemraj Shastri v Jyoti Sharma

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(W)-475–03 OF 2022
NANTHA BALAN, AZHAHARI RAMLI AND AHMAD KAMAL JJCA
26 SEPTEMBER 2025

C *Family Law — Divorce — Division of matrimonial assets — Whether properties were truly matrimonial assets — Whether wife had proven entitlement to share in assets due to her contribution in looking after welfare of family — Whether husband's unilateral disposal of assets to company related to him showed intention to deny wife of obtaining share in properties — Whether s 76 of*
D *Law Reform (Marriage and Divorce) Act 1976 allowed court to order husband to pay wife half the market value of the disposed assets even though the assets no longer belonged to him*

After allowing the appellant's petition to divorce his wife (the respondent), the
E High Court made several consequential orders including division of the matrimonial assets pursuant to s 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). Two of those assets were a three-storey shoplot ('the Setapak shoplot') and a freehold bungalow ('the Titiwangsa house'). In respect of these two properties, the High Court had ordered the appellant to pay to the
F respondent 50% of their market value as at the date of the court's decision since ownership of the properties had been transferred to two companies related to the appellant (namely, 'Hemraj' and 'Mahalaxmi'). The trial court found that the two properties were matrimonial assets, since they were bought by the appellant during the marriage, and that the respondent was entitled to a
G half-share in each of them (pursuant to s 76(2)(aa) of the Act) because she had not only looked after the appellant and their only child but also the appellant's parents during the marriage. In the instant appeal, the appellant argued that the two properties should not be regarded as matrimonial assets which were subject to division. With regard to the Setapak shoplot, the appellant said he
H bought the property just about a year after his marriage to the respondent was registered, but because of financial problems, he sold it to Hemraj 14 months later at a loss (Hemraj thereafter sold the property to Mahalaxmi). The appellant said the respondent did not monetarily contribute towards the acquisition of the Setapak shoplot and even if her contribution by way of
I looking after the home and taking care of him and his parents was considered, it was minimal in view of the short period of time between the dates of acquisition and disposal of the property. With regard to the Titiwangsa house, the appellant said that although the property was bought in his name, his mother paid the deposit for the property whilst his sister took care of the

monthly loan payments as he was not financially able to do so. He said that about 17 months after the purchase, he sold the Titiwangsa house to Hemraj (which also eventually sold the property to Mahalaxmi five years later). The appellant said the respondent did not make any monetary contribution to the acquisition of the Titiwangsa house either. The appellant submitted that the court should not entertain the respondent's contention that either Hemraj or Mahalaxmi held the two properties on trust for him because those companies were separate legal entities and not parties to the action. The respondent, on the other hand, contended that the two properties were matrimonial assets as they were bought by the appellant in his name during the marriage and the Titiwangsa house, in particular, was intended to be the matrimonial home. The respondent alleged that the transfers of the two properties to Hemraj were mala fide and intended to deprive her of having any share in the properties.

Held, unanimously setting aside the High Court's decision with regard to the Setapak shoplot but affirming its decision with regard to the Titiwangsa house:

(1) The Setapak shoplot and the Titiwangsa house were matrimonial assets of the marriage as they were acquired after the marriage of the parties (see para 42).

(2) The High Court erred in ordering the division of the Setapak shoplot. When the property was sold in 1998, the parties had been married for about two years. Whilst it could not be disputed that the respondent did contribute to the acquisition of the property by looking after the home and caring for the appellant and his parents (under s 76(2)(aa) of the Act), in view of the short period of time from the date of acquisition to the date of disposal of the asset, such contribution was minimal (see paras 52 & 54).

(3) The appellant's explanation that he sold the Setapak shoplot due to his financial problame was reasonable. Furthermore, notwithstanding the strained relationship between the respondent and the appellant's family, there was no evidence that the appellant was contemplating divorcing her at that material time. The court also took into consideration the fact that the Setapak shoplot was sold 19 years before the date of this proceeding and now remained as an asset of a separate legal entity (Mahalaxmi) which was not named in this proceeding. Although the property was sold to a company related to the appellant, there was no evidence of mala fide on the appellant's part in selling the Setapak shoplot (see para 53).

(4) No declaration or order of resulting trust could be made in the respondent's favour against the two companies as the companies were not parties to the proceedings. Any order made against the companies with regard to the issue of resulting trust would contravene the rule of natural justice (see para 68).

(5) The chronology of events showed mala fide on the appellant's part in disposing of the Titiwangsa house at a time when he was having problems with the respondent. The disposal was made unilaterally by the appellant to a company whose director was related to him. Despite the sale, the appellant had continued to stay in the Titiwangsa house whilst he rented the Sri Pelangi Apartment unit for the respondent and his child to stay in. The appellant had disposed of the Titiwangsa house without any sense of responsibility for the welfare of the respondent and his child (see para 71).

(6) Section 76 of the Act gave wide discretion to the court to determine and mould an appropriate order with respect to the matrimonial assets. If the justice of the case required it, the division of an asset based on its current market value could be made without ordering the asset to be sold. In the present case, it was just and appropriate that the respondent was given a 50% share in the Titiwangsa house. Since the appellant was no longer the registered owner of the property, the High Court was right in ordering him to pay the respondent a sum that was equivalent to 50% of the market value of the house as at the date of the trial court's decision, ie on 11 February 2022 (see paras 78 & 80).

[Bahasa Malaysia summary

Selepas membenarkan petisyen penceraian yang difailkan oleh perayu terhadap isterinya (responden), Mahkamah Tinggi telah membuat beberapa perintah susulan termasuk pembahagian harta sepencarian selaras dengan s 76 Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut'). Dua harta yang terlibat ialah sebuah lot kedai tiga tingkat ('lot kedai Setapak') dan sebuah banglo pegangan bebas ('rumah Titiwangsa'). Berkenaan kedua-dua hartanah ini, Mahkamah Tinggi memerintahkan perayu membayar kepada responden 50% daripada nilai pasaran hartanah tersebut pada tarikh keputusan mahkamah memandangkan hak milik hartanah telah dipindahkan kepada dua syarikat yang berkaitan dengan perayu (iaitu, 'Hemraj' dan 'Mahalaxmi'). Mahkamah perbicaraan memutuskan bahawa kedua-dua hartanah tersebut adalah harta sepencarian kerana ia dibeli oleh perayu semasa perkahwinan masih wujud, dan responden berhak kepada separuh bahagian setiap satu (mengikut s 76(2)(aa) Akta tersebut) memandangkan beliau bukan sahaja menjaga perayu dan anak tunggal mereka, tetapi turut menjaga ibu bapa perayu semasa perkahwinan. Dalam rayuan ini, perayu berhujah bahawa kedua-dua hartanah tersebut tidak sepatutnya dianggap sebagai harta sepencarian yang boleh dibahagikan. Bagi lot kedai Setapak, perayu menyatakan bahawa hartanah itu dibeli kira-kira setahun selepas perkahwinan didaftarkan, tetapi kerana menghadapi masalah kewangan, beliau telah menjualnya kepada Hemraj 14 bulan kemudian pada harga rugi (Hemraj kemudiannya menjual hartanah itu kepada Mahalaxmi). Perayu berhujah bahawa responden tidak memberi sumbangan wang dalam pembelian lot kedai

tersebut, dan sekalipun penjagaan responden terhadap rumah tangga serta dirinya dan ibu bapanya diambil kira, sumbangan itu adalah minimum memandangkan tempoh masa singkat antara tarikh belian dan jualan. Bagi rumah Titiwangsa, perayu menyatakan bahawa walaupun hartanah itu dibeli atas namanya, deposit telah dibayar oleh ibunya manakala bayaran ansuran bulanan ditanggung oleh adiknya kerana beliau sendiri tidak berkemampuan. Beliau menyatakan bahawa kira-kira 17 bulan selepas pembelian, rumah Titiwangsa telah dijual kepada Hemraj (yang kemudian menjual hartanah itu kepada Mahalaxmi lima tahun selepas itu). Perayu menegaskan bahawa responden juga tidak memberi sebarang sumbangan kewangan terhadap pembelian rumah Titiwangsa. Perayu juga berhujah bahawa mahkamah tidak seharusnya menerima dakwaan responden bahawa Hemraj atau Mahalaxmi memegang dua hartanah itu sebagai pemegang amanah bagi pihaknya, kerana kedua-dua syarikat tersebut adalah entiti undang-undang berasingan dan bukan pihak dalam prosiding ini. Responden pula menegaskan bahawa kedua-dua hartanah tersebut adalah harta sepencarian kerana ianya dibeli oleh perayu atas namanya sendiri semasa perkahwinan, dan rumah Titiwangsa khususnya memang dimaksudkan sebagai rumah kediaman perkahwinan. Responden juga mendakwa bahawa pemindahan dua hartanah itu kepada Hemraj dilakukan secara mala fide, iaitu dengan niat untuk menafikan haknya terhadap bahagian dalam harta tersebut.

Diputuskan, sebulat suara mengenepikan keputusan Mahkamah Tinggi mengenai lot kedai Setapak namun mengekalkan keputusan mengenai rumah Titiwangsa:

(1) Lot kedai Setapak dan rumah Titiwangsa adalah harta sepencarian kerana diperoleh selepas perkahwinan pihak-pihak (lihat perenggan 42).

(2) Mahkamah Tinggi telah tersalah arah apabila memerintahkan pembahagian ke atas lot kedai Setapak. Apabila hartanah tersebut dijual pada tahun 1998, tempoh perkahwinan pihak-pihak hanyalah lebih kurang dua tahun. Walaupun tidak dapat dinafikan bahawa responden ada memberi sumbangan terhadap pemerolehan hartanah tersebut melalui sumbangan bukan kewangan iaitu dengan menjaga rumah tangga serta mengurus kebajikan perayu dan ibu bapanya sebagaimana diiktiraf oleh s 76(2)(aa) Akta tersebut, namun memandangkan jarak masa yang amat singkat antara tarikh pembelian dan tarikh pelupusan aset tersebut, sumbangan responden itu adalah pada tahap yang minimum (lihat perenggan 52 & 54).

(3) Penjelasan perayu bahawa beliau menjual lot kedai Setapak tersebut akibat masalah kewangan adalah munasabah. Tambahan pula, walaupun terdapat hubungan yang tegang antara responden dan keluarga perayu, tiada keterangan bahawa perayu pada ketika itu mempunyai niat untuk menceraikan responden. Mahkamah turut mengambil kira bahawa lot

kedai Setapak tersebut telah dijual 19 tahun sebelum prosiding ini bermula dan kini kekal sebagai aset sebuah entiti perundangan berasingan (Mahalaxmi) yang tidak dinamakan dalam prosiding ini. Walaupun hartanah itu dijual kepada sebuah syarikat yang berkaitan dengan perayu, tiada bukti kewujudan mala fide oleh perayu dalam penjualan tersebut (lihat perenggan 53).

(4) Tiada perisytiharan atau perintah amanah berbangkit ('resulting trust') boleh dibuat yang memihak kepada responden terhadap kedua-dua syarikat tersebut kerana syarikat-syarikat itu bukan pihak dalam prosiding ini. Sebarang perintah terhadap syarikat-syarikat tersebut berhubung isu amanah berbangkit akan melanggar prinsip keadilan asasi ('natural justice') (lihat perenggan 68).

(5) Kronologi peristiwa jelas menunjukkan mala fide di pihak perayu dalam melupuskan rumah Titiwangsa pada ketika beliau menghadapi masalah rumahtangga dengan responden. Pelupusan tersebut dibuat secara sebelah pihak oleh perayu kepada sebuah syarikat yang pengarahnya mempunyai pertalian dengan beliau. Walaupun rumah tersebut telah dijual, perayu terus menetap di Rumah Titiwangsa sementara beliau menyewa unit Apartmen Sri Pelangi untuk diduduki oleh responden dan anak mereka. Tindakan perayu melupuskan Rumah Titiwangsa tanpa sebarang rasa tanggungjawab terhadap kebajikan responden dan anaknya adalah tidak wajar dan menunjukkan niat tidak baik (lihat perenggan 71).

(6) Seksyen 76 Akta memberikan budi bicara yang luas kepada mahkamah untuk menentukan dan membentuk perintah yang sesuai mengenai pembahagian harta sepencarian. Jika keadilan kes memerlukannya, pembahagian sesuatu aset berdasarkan nilai pasaran semasa boleh dibuat tanpa perlu memerintahkan aset tersebut dijual. Dalam kes ini, adalah adil dan wajar bahawa responden diberikan bahagian 50% dalam Rumah Titiwangsa. Memandangkan perayu bukan lagi pemilik berdaftar hartanah tersebut, Mahkamah Tinggi adalah betul apabila memerintahkan beliau membayar kepada responden suatu jumlah yang bersamaan dengan 50% nilai pasaran rumah tersebut pada tarikh keputusan mahkamah bicara, iaitu pada 11 Februari 2022 (lihat perenggan 78 & 80).]

Cases referred to

Ching Seng Woah @ Cheng Song Huat v Lim Shook Lin [1997] 1 MLJ 109; [1997] 1 CLJ 375; [1997] 7 MLRH 287, CA (folld)

Choy Yoke Ying v Yong Yook Seng & Anor [2004] MLJU 772; [2004] 8 CLJ 105; [2004] 2 MLRH 394, HC (folld)

James Jemut Masing v Fiona Frances Masing Nee Henderson [1994] MLJU 531; [1994] 2 CLJ 390; [1994] 1 MLRH 211, HC (folld)

Koay Cheng Eng v Linda Herawati Santoso [2008] 4 MLJ 863; [2008] 4 CLJ 105; [2008] 1 MLRA 230, CA (folld)
Lee Eng Eaw (as director of Lee Guat Chew & Co Sdn Bhd) v Mary Lee (as executrix of the estate of Low Ai Lian) & Ors [1999] 3 MLJ 481; [1999] 3 CLJ 143; [1999] 1 MLRA 302, CA (refd)
Tenaga Nasional Bhd v Majlis Daerah Segamat [2022] 2 MLJ 119; [2022] 2 CLJ 497; [2022] 2 MLRA 334, FC (folld)
Wachtel v Wachtel [1973] Fam 72, CA (folld)

Legislation referred to

Evidence Act 1950 ss 101, 102
Law Reform (Marriage and Divorce) Act 1976 s 76, 76(2)(aa), 78

Appeal from: *Girish Chandra a/l Hemraj Shastri v Jyoti Sharma* [2024] MLJU 1616 (High Court, Kuala Lumpur)

Rajan Navaratnam (with Sheena Stephanie Sebastian and Muhammad Muzammil bin Abdul Halim) (Shahrizat Rashid & Lee) for the appellant.
Rajinder Kaur a/p Sukhdev Singh (S Rajinder & Co) for the respondent.

Azhahari Kamal JCA:

INTRODUCTION

[1] This is an appeal by the appellant husband against the decision of the learned High Court judge ('HCJ') in a divorce proceeding between the appellant husband and the respondent wife. In the High Court, the appellant husband, by way of a petition dated 6 April 2017, sought to dissolve the marriage and prayed for various consequential reliefs. The respondent wife filed a counter petition also seeking to dissolve the marriage with various consequential reliefs, including maintenance and division of property. Hereafter we shall refer to the appellant husband and the respondent wife as 'appellant' and 'respondent' respectively.

[2] After a full trial, the learned HCJ ordered that the marriage be dissolved and made various consequential orders.

BACKGROUND FACTS

[3] The background facts of this appeal can be gleaned from the affidavits filed in the High Court as well as the written submission of learned counsel herein. We would adopt the same with some modifications.

[4] The appellant is a dentist and the only son of a Malaysian family of Indian nationality. His family wanted him to take a woman of Indian

nationality as his wife. The parties were married in India on 20 November 1995. The respondent was a chemistry teacher in India and prior to the marriage, the appellant said that he only met the respondent once in May or June 1995. Prior to the marriage, there were problems between the parties. The appellant's sister had asked for her original birth chart that was made at the time of the respondent's birth. The respondent said that her father could not find her original birth chart and instead, showed the computer version of her birth chart to the appellant's family. The appellant's family accused the respondent's family of cheating them for their failure to produce the original birth chart. Nonetheless they went ahead with the said marriage. However, the appellant's family sent the respondent back to her family home on the first night of the wedding.

[5] After the said marriage ceremony, the appellant and his family went home to Malaysia. The respondent only joined them in Malaysia in March 1996. Thereafter, the appellant and the respondent lived together with the appellant's family at 137–5 Lengkuk Mata Air, Taman Keat Ann, Setapak 53200 Kuala Lumpur. The marriage was registered with the National Registration Department on 26 July 1996.

[6] The only child of the said marriage was born on 15 March 2007.

[7] In July 2013, after 18 years of the marriage, the appellant and the respondent moved to a house at No 3, Lorong Titiwangsa 4, Taman Tasik Titiwangsa 53200 Kuala Lumpur ('the Titiwangsa house').

[8] The marital relationship between the parties was a strained one. The respondent contended that there was lack of harmony and mutual respect from its inception. According to the respondent, despite the respondent's family efforts to fulfil all ceremonial obligations during the wedding, the appellant's family expressed their dissatisfaction, accusing the respondent's family of inadequate treatment and unfulfilled dowry demands. The respondent claimed that she had lived and served the appellant for 19 years before moving to the Titiwangsa house. According to the respondent, although she persevered in her relationship with the appellant despite the hardships she had faced, the situation worsened after they moved to the Titiwangsa house when Sudha Kumari, the appellant's sister, began living with the couple and the appellant's mother sometime in early 2013. It is also the respondent's case that the appellant had been carefully planning his severance from the respondent while simultaneously trying to dispose and transfer the Titiwangsa house held under his name to Hemraj (a company under which the appellant had been running his dental clinic) and then to Mahalaxmi (a company wholly owned by his sister, Sudha Kumari) on 8 February 2016.

[9] Despite the respondent's plea for love and commitment from the appellant, the appellant continued to be unconcerned towards respondent's dedication to the marriage which she continues to show with sincere love and affection for the appellant, including caring and preparing special detox and separate meals and juices for his recovery during appellant's cancer diagnosis sometime in 2002. This 'uncaring' attitude of the appellant culminated in the incident on 31 December 2014 where the appellant chose not to pick up the respondent and the child from KLIA upon their return from India, forcing the respondent to wait for four hours from midnight of 31 December 2014 before she decided to take a taxi to a relative's house in Bangsar.

[10] The appellant, on the other hand, claims that the respondent has a history of mental health issues wherein, among others, the respondent was rushed to Tawakal Specialist Medical Centre in 1998 after an attempted suicide by consuming 35 pain killers. This was committed for purposes of getting the attention of the appellant, who according to the respondent had been neglecting her.

[11] The appellant claims that in July 2013, after 18 years of the marriage, they moved into the Titiwangsa house. This Titiwangsa house is under his sister and mother's name. He claims that this move is necessary as a result of the respondent's continuous acts of hurting herself and endangering the life of the child.

THE PROCEEDINGS IN THE HIGH COURT

[12] Prior to the divorce petition, the appellant filed an Originating Summons No 24F-29–02 of 2025 ('the said OS') for the custody of the child. On 25 June 2015 the High Court made an interim custody order to give joint custody of the child to the appellant and the respondent ('2015 order'). This order was varied on 17 January 2017 giving the appellant custody, care and control of the child ('the 2017 order').

[13] In his petition, the appellant prayed for:

(a) the dissolution of the marriage;

(b) the 2017 order be maintained;

(c) the expenses and educational needs of the child of the marriage be borne by the appellant, and the respondent pay the sum of RM500 per month towards the expenses of the child from the year 2019;

(d) the appellant is not obliged to pay any maintenance to the respondent; and

(e) costs of the divorce proceeding to be borne by the parties respectively.

[14] In support of his petition, the appellant pleads that the marriage has irretrievably broken down due to the fact that the respondent has behaved in such a way that the appellant cannot reasonably be expected to live with the respondent. This in turn is due to the fact that the respondent had left the matrimonial home together with the child of the said marriage.

[15] The respondent denied the allegation. She claimed that the appellant showed no love and care to her throughout the marriage. She said that she was treated like a maid and had to cook and clean and look after the appellant, his parents and his sister Dr Sudha Kumar ('PW2'), who after her own divorce came to live with them in the Titiwangsa house. In addition, the respondent had to do the gardening at the Titiwangsa house and worked at the appellant's clinic. She also had to collect the monthly rentals from the appellant's rental properties and deposit and banked in cheques for the clinics. She said she was constantly verbally abused by the appellant's sister ('PW2').

[16] The respondent responded by filing a cross-petition and prayed for the dissolution of the marriage and custody of the child with access to be given to the appellant. She also prayed for consequential reliefs:

(a) the appellant pays the child maintenance in the sum of RM2,000 per month with an increment of 10% every year until the child has graduated from high school or obtains his first degree;

(b) the appellant pays spousal maintenance in the sum of RM3,000 per month with an increment of 10% every year;

(c) the appellant be ordered to transfer to the respondent 50% of his or his beneficial interest in the following properties:

(i) the house held under grant no 5627, Lot No 8256 Mukim Setapak, Daerah Kuala Lumpur bearing the address No 137–5, Taman Keat Ann, Setapak, 53200 Kuala Lumpur ('the Setapak house');

(ii) the freehold bungalow house under individual title GRN 40763 Lot 108, Seksyen 86, Bandar Baru Kuala Lumpur, Daerah Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur, bearing the address No 3, Lorong Titiwangsa 4, 53200 Kuala Lumpur ('the Titiwangsa house');

(iii) a three-storey shoplot held under PN251, Lot 9309 Mukim Setapak, Daerah Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur bearing the address No 261, Jalan Genting Kelang 53399 Kuala Lumpur ('the Setapak shoplot'); and

(iv) the shoplot bearing the address No B03/1, Pusat Perdagangan

Taman Dagang, Jalan Dagang Besar, 68000 Ampang, Selangor ('the Ampang shoplot'). A

(d) in the alternative to transferring 50% of his share or beneficial interest in the Titiwangsa house, the appellant purchases a three-bedroom house in Bangsar Kuala Lumpur in the name of the respondent or pays her compensation in the sum equivalent to, half the current market value of the Titiwangsa house; B

(e) in the alternative to transferring 50% of his share or beneficial interest in the Setapak shoplot appellant to pay compensation equivalent to half the current market value of the Setapak shoplot; C

(f) in the alternative to transferring 50% of his share or beneficial interest in the Ampang shoplot appellant to pay compensation equivalent to half the current market value of Ampang shoplot;

(g) the appellant pays the respondent a lump sum of RM80,000 for the purchase of a car for her personal use; D

(h) the appellant transfers to the respondent half of the monies in saving accounts and fixed deposit accounts in the appellant's name and half of the monies held on trust by any parties on behalf of the appellant; E

(i) the appellant pays to the respondent half of the monies in the appellant's account in his Employees Provident Fund ('the EPF account');

(j) the appellant discloses all accounts of movable and immovable properties held on trust by the appellant's family or under the appellant's family-owned business for the benefit and on behalf of the appellant; F

(k) a half share of all the matrimonial assets belonging to the appellant held on trust for the appellant by members of appellant's family to be transferred to the respondent;

(l) all gold jewellery belonging to the respondent and in the appellant's custody to be returned to the respondent; G

(m) all books, personal letters written to the respondent by her family and personal photos belonging to the respondent currently in the appellant custody to be returned to the respondent; H

(n) all of respondent's apparel and personal belongings currently in the appellant's custody, either in the Titiwangsa house or any other premises, be returned to the respondent; and

(o) all costs of the proceeding be borne by the appellant. I

[17] It must be noted that, in respect of the matrimonial assets, the respondent pleads that the assets are held on trust for the appellant by members of appellant's family.

A THE DECISION OF THE LEARNED HCJ

[18] After a full trial, the learned HCJ ordered that the marriage be dissolved and the decree nisi be made absolute immediately and made the following consequential orders:

B

(a) joint guardianship of the child to both the appellant and respondent;

(b) the child shall be under the custody, care and control of the appellant. In all matters of the child's education, religion, and health issues the appellant and respondent shall consult each other before a decision is made, and there shall be no unilateral decision as regards these matters by one party. The appellant shall inform the respondent of the latest updates on the child's education;

C

(c) the respondent shall have access to the child on alternate weekends from Friday 6pm to Sunday 6pm;

D

(d) the respondent shall have access to the child on alternative public holidays and for one week during his school term holidays;

(e) the appellant shall deliver the child's passport to respondent when the respondent is taking the child out of Malaysia, and the child's passport shall be returned to the appellant upon respondent's return with the child. When taking the child out of Malaysia, each party shall inform the other, prior to the departure, of the flight details, travel itinerary, addresses overseas and date of return;

E

F

(f) the appellant and respondent shall be at liberty to contact the child by telephone when the child is with the other party;

(g) the appellant shall pay the respondent maintenance in the sum of RM3,000 per month on or before the seventh of each month from the date of the decision until her remarriage;

G

(h) the appellant shall pay the respondent any and all arrears in spousal maintenance due and owing by the appellant to the respondent, pursuant to the 2017 consent order;

H

(i) the appellant shall bear the costs of the child's food, clothing, accommodation, and general upkeep, medical and dental costs, and education until he completes his first degree or a vocational course, depending on his ability;

I

(j) the following properties are matrimonial assets acquired during the course of the marriage:

(i) the three-storey shoplot held under PN 251, Lot 9309 Mukim Setapak, Daerah Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur bearing the address No 261, Jalan Genting Klang 53399

Kuala Lumpur ('the Setapak shoplot'); and

(ii) the freehold bungalow house under individual title Lot 108, Seksyen 86, Bandar Baru Kuala Lumpur, Daerah Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur bearing the address No 3, Lorong Titiwangsa 4, 53200 Kuala Lumpur ('the Titiwangsa house')

(k) the appellant shall pay to respondent a sum equivalent to 50% of the current market value of the Setapak shoplot and the Titiwangsa house as at the date of the decision;

(l) the appellant shall transfer to the respondent 50% of monies standing to the credit of his savings accounts, current accounts and fixed deposit accounts and 50% of all monies held on trust by others for and on behalf of the appellant as at the date of the decision;

(m) the appellant shall transfer to and/or cause the Board of the Employees Provident Fund ('EPF') to transfer to the respondent a sum equivalent to 50% of the amount standing to the credit of the appellant's EPF account as at the date of the decision;

(n) the appellant shall return to the respondent the following items:

(i) all gold jewellery belonging to the respondent, which is currently in the custody of the appellant;

(ii) all books, personal letters written to the respondent by her family, and personal photo belonging to the respondent, which are currently in the appellant custody; and

(iii) all apparel and personal belongings of the respondent which are currently in the custody of the appellant either at the Titiwangsa house or at any other premises where the said belongings are kept.

(o) the respondent is granted leave to levy execution or to take other measures legally available to her to recover the payments ordered against the appellant;

(p) the appellant is ordered to pay the respondent cost of the proceeding in the sum of RM50,000; and

(q) interest at the rate of 5%pa on the payments ordered herein from 11 February 2022 until the date of full and final settlement of the payments.

[19] Dissatisfied with the decision of the learned HCJ the appellant appeals to this court against part of the decision with regard to the joint guardianship of and access to the child and matters related to the maintenance and upbringing of the child as specified in paras 18 (a), (b), (c), (d), (e), (g), (h) and

(i) of this grounds of judgment. The appellant also appeals against the decision of the learned HCJ with respect to the matrimonial properties as specified in paras 18 (j), (k), (l), (m), (n), (o), (p) and (q).

[20] Nevertheless, at the commencement of this appeal, learned counsel for the appellant had indicated that the appeal would only be confined to the order of the learned HCJ in allowing the respondent's claim to 50% share of the current market value of the Setapak shoplot and the Titiwangsa house.

SUMMARY OF THE DECISION OF THE LEARNED HCJ

[21] In light of the position taken by the appellant in this appeal, we will refer to the relevant part of the learned HCJ's grounds of judgment.

[22] Based on the evidence adduced during the trial, the learned HCJ found that the marriage had irretrievably broken down and apportions all the liability for the breakdown of the marriage on the appellant for the following reasons:

(a) the appellant did not try to stop his sister (PW2) when she had physically assaulted the respondent on 8 November 2014. The respondent was traumatised by the incident and lost faith in the appellant;

(b) the appellant had never felt any love for the respondent nor did he care for her;

(c) the appellant did not go to pick up the respondent upon her return to Malaysia from India with the child on 31 December 2014. The respondent had to wait for the appellant at the KLIA for four hours from midnight before she decided to take a taxi to her friend's house in Bangsar;

(d) on 12 January 2015 the respondent went to the marriage conciliation tribunal. The tribunal issued a certificate dated 30 July 2015 stating that 'pasangan enggan didamaikan' (parties refused to be reconciled); and

(e) on 12 February 2015 the appellant did not allow the respondent and the child to enter the Titiwangsa house because according to the appellant he was no longer staying there. He then took the respondent to an apartment (Pelangi apartment). He told the respondent he was renting the apartment. However, the appellant did not stay with the respondent and the child in the apartment, but instead, he was living in the Titiwangsa house together with his mother and PW2.

[23] The learned HCJ found that the Setapak shoplot and the Titiwangsa house were acquired during the appellant and respondent's marriage. Therefore, it formed part of their matrimonial asset. The fact that the appellant had moved both properties to companies where he is a shareholder and director

and to companies where his mother and/or sisters are shareholders and/or directors, when his marriage to the respondent was beginning to break down, does not mean that both properties no longer formed part of the matrimonial assets. According to the learned HCJ, the evidence adduced during the trial shows that the respondent not only looked after the appellant and the child of the marriage but also the appellant's parents. The learned HCJ believed the respondent's evidence that she not only looked after the appellant and the child or the marriage, but also the appellant's parents. She also had cooked, cleaned and look after the appellant, the child, the appellant's father (when he was still alive), his mother and PW2 when she came to stay with them at the Titiwangsa house.

SUMMARY OF THE SUBMISSION OF THE APPELLANT

[24] Counsel for the appellant submitted that the Setapak shoplot and Titiwangsa house are not matrimonial assets and that the learned HCJ did not have the power for apportionment under s 76 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act').

[25] With regard to the Setapak shoplot, it was submitted that the said shoplot was bought in 1997. Due to the financial crisis in 1997, the appellant was not able to service the loan and he was about to be declared a bankrupt. To avoid this, the appellant sold the Setapak shoplot to Hemraj & Co ('Hemraj') in 1998 at a loss for RM600,000 pursuant to a sale and purchase agreement dated 22 October 1998. Hemraj then sold and transferred the Setapak shoplot to Mahalaxmi Holistics Sdn Bhd ('Mahalaxmi') on 8 January 2014. The appellant was not a shareholder of Hemraj and there is no evidence that the appellant had benefited from the sale. The Setapak shoplot was bought merely six months after the marriage and the respondent did not adduce evidence that she had made any contribution of the Setapak shoplot. There is also no order to set aside the sale of the Setapak shoplot by the appellant to the respondent to Hemraj and the subsequent sale from Hemraj to Mahalaxmi.

[26] With regard to the Titiwangsa house, it was submitted that it was purchased under the appellant's name in 2009 at the instruction of the appellant's elder sister and his mother with the hope that he was able to secure a loan. However, the bank insisted that the appellant to bring in another joint borrower due to the poor financial standing of the appellant, hence PW2 became a joint borrower. The appellant further submits that the deposit of RM500,000 for the Titiwangsa house was paid by his mother and the monthly instalment payment for the loan was paid by PW2. The appellant was not at all material times financially capable of making the monthly instalment of RM10,283. Thereafter, after less than one year after the purchase, the Titiwangsa house was sold to Hemraj. A sale and purchase agreement dated

21 November 2009 was entered into between the appellant and Hemraj. In this respect, the appellant adduced evidence that his sister Vinita Kumari had transferred RM2,108,254 to Hemraj. Subsequently, the Titiwangsa house was purchased by Mahalaxmi. The appellant is not a shareholder nor a director of Mahalaxmi. The appellant also did not make any monetary contribution towards the Titiwangsa house.

[27] It is further submitted that the learned HCJ has erred in ordering the appellant to pay the respondent a sum equivalent to 50% of the current market value of the Setapak shoplot and the Titiwangsa house as at the date of the decision (11 February 2022) as this order is not within the ambit of s 76 of the Act. According to the appellant, the discretion of the court under s 76 of the Act is only:

(a) to divide the property, share between parties, or award a sale of the property and divide the proceed of sale; and

(b) in the event the court orders a sale of the property, this would be done at the current market price.

[28] According to the appellant, the respondent's claim on the Setapak shoplot and the Titiwangsa house is on the premise that the two properties were held by Hemraj and Mahalaxmi on the basis that there is a resulting trust with regard to the beneficial ownership of the properties which was in the possession of the appellant. As such, the claim is incompetent as the respondent has failed to add both Hemraj and Mahalaxmi; and the court should not make any order without hearing both Hemraj and Mahalaxmi.

SUMMARY OF THE SUBMISSION OF THE RESPONDENT

[29] The respondent maintained that the Setapak shoplot and the Titiwangsa house are the matrimonial properties of the marriage. The two properties were initially registered in the name of the appellant during the marriage. In fact, the Titiwangsa house was always intended to be the matrimonial home belonging to the appellant in which his family was to reside.

[30] The respondent submitted that she had, during the marriage, carried out all the household works from the time she was married to the appellant. She had also worked at the Klinik Pergigian Genting with the appellant and received a monthly remuneration of RM5,000 per month. This fact is not disputed by the appellant. In fact, in his answer to the cross-petition, the appellant clearly states that the payment of wages to the respondent, which he kept, was not to invest in the properties but for the purpose of running the household. Her contribution to the family of the appellant is immense and despite the appellant challenging her contributions towards the properties, the

fact that the wages of RM5,000 a month was paid to her was not denied by the appellant. According to the respondent, this goes to prove that the respondent not only cared for the family but there is admission by way of pleadings by the appellant that the respondent supported the household expenses substantially, by way of her monthly wages of RM5,000. Hence, the respondent submitted that her support of the whole household, taking care of the appellant's family, the child of the marriage and her numerous other contributions are pertinent in deciding the division of matrimonial properties according to s 76 of the Act.

[31] With regard to the transfer/disposal of the properties, it was submitted that the appellant's disposal of the properties in his name and assets in his name to Hemraj and thereafter to Mahalaxmi, a company owned by his sister, followed by the systematic transfer of other assets appears to be a deliberate attempt to evade his financial obligations to the respondent which is contrary to the principles of fairness and equity enshrined in the Act. This is evident from the fact that there is no explanation why the said properties were first bought in the appellant's name which make him the beneficial owner of the properties. If indeed he is not the beneficial owner surely it makes more sense for Sudha Kumari to purchase the Titiwangsa house in her name outright.

ADDITIONAL ISSUE: WHETHER PROPER PARTY HAVE BEEN NAMED IN THE PROCEEDING

[32] In the course of hearing this appeal, and based on para 51 of the cross-petition referred to in para 16 of this judgment, we raise the following issues and invited counsel to address the new issues by way of additional written submission. The issues are:

(a) whether the respondent's cross-petition based on the claim of resulting trust (para 51 of the cross-petition) is competent when the parties who are allegedly holding the property on trust ie Hemraj & Co Sdn Bhd and Mahalaxmi Holostic Sdn Bhd are not before the court; and

(b) what is the effect of the claim based on a resulting trust when there is no finding by the learned HCJ that the appellant had transferred the Setapak shoplot purchased in 1997 and sold to Hemraj in 1998, and the Titiwangsa house purchased in 2008 and sold to Hemraj in 2009 (registered in 2010) so as to deny the respondent of her entitlements, even though there was no evidence that Hemraj was holding the said properties on trust for the appellant.

Summary of the appellant's submission on additional issue

[33] Applying the separate legal entity principle in company law, the appellant submitted that the assets of Hemraj and Mahalaxmi cannot be considered as the asset of the appellant. At the time of filing of the

cross-petition, the respondent is aware of this fact, hence, any allegations towards the properties and/or any order of the court must necessarily include allegations and/or orders made against the companies themselves being separate legal entities, and not solely against the appellant. The respondent had also not pleaded fraud or any special circumstances to warrant the disregarding of the legal personality of Hemraj and/or Mahalaxmi. As such the corporate structure must be upheld.

[34] Applying the principle in the case of *Tenaga Nasional Bhd v Majlis Daerah Segamat* [2022] 2 MLJ 119; [2022] 2 CLJ 497; [2022] 2 MLRA 334 the appellant contended that the court has no jurisdiction over any person other than those brought before it and no order can be made for or against or binds a non-party before a proceeding. It is further submitted that no evidence has been adduced showing that the appellant owned, controlled or benefitted from the companies at the relevant times. As such the properties therefore belonged to the registered proprietors ie Hemraj and Mahalaxmi and not the appellant, at any time.

[35] It was impressed upon us that, without Hemraj and Mahalaxmi being a party to the proceedings, the court could not properly assess the veracity of the claims nor make findings that would bind their propriety rights. There is also no pleading of fraud or special circumstances to justify piercing the corporate veil. Any proceedings in their absence amounts to a denial of natural justice. The learned HCJ's decision on this issue was made without jurisdiction and the resulting trust claim should have been dismissed.

Summary of the respondent's submission on additional issue

[36] The respondent argued that, notwithstanding the plea for resulting trust, the judgment pertaining to the issue of trust would not affect the companies. In effect, she is not seeking any enforcement order against the companies. It was further submitted that on 23 February 2015 the respondent returned to the Titiwangsa house but the appellant told her that he was no longer staying there and sent the respondent to the Sri Pelangi apartment which he told the respondent that he was renting. However, the appellant did not stay at the Sri Pelangi apartment but, instead, returned to the Titiwangsa house. It was contended by the respondent that, considering the fact that the Mahalaxmi was incorporated on 22 November 2013 and the Titiwangsa house was transferred to Mahalaxmi on 8 January 2014, the fact that the appellant had returned to the Titiwangsa house after sending her to the Pelangi apartment show that the Titiwangsa house was in fact the appellant's house.

[37] Again, considering that the appellant had reached out to the respondent's sister ('RW1') sometime at the end of 2013 informing her of his

marital issue with the respondent, it was submitted that the appellant had been planning about the separation with the respondent and the transfer of the Titiwangsa house is part of the appellant's plan to deny her share in the said house.

[38] Be that as it may, it was submitted that the respondent had pleaded that the transfers of the properties were done mala fide. Hence the failure to name the two companies as parties is not fatal to the respondent's case.

ANALYSIS AND OUR FINDING

[39] The main issues to be determined in this appeal are:

(i) whether the Setapak shoplot and the Titiwangsa house are matrimonial assets of the marriage; and

(ii) if the answer to issue (i) is in the affirmative, whether the learned HCJ was correct in ordering transfer to the respondent 50% of the appellant's beneficial interest and that the appellant shall pay to the respondent a sum equivalent to fifty percent (50%) of the current market value of the Setapak shoplot and the Titiwangsa house as at the date of the decision.

[40] The word 'matrimonial asset' is not defined in the Act. Hence, it becomes necessary to refer to the common law cases, especially from the United Kingdom and Singapore. In the early 70's the concept of 'matrimonial asset' was highlighted in the case of *Wachtel v Wachtel* [1973] Fam 72, where Lord Denning stated at pp 90–91 that:

> The phrase 'family assets' is a convenient short way of expressing an important concept. It refers to those things which are acquired by one or both parties, with the intention that they should be a continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. It is a phrase, for one of a better, used by the law Commission, and is well understood.
>
> The family assets can be divided into two parts: (i) Those which are of a capital in nature, such as the matrimonial home and the furniture in it: (ii) Those which are of a revenue producing nature, such as the earning power of the husband and wife. When the marriage come to an end, the capital assets have to be divided: the earning power of each has to be allocated.

[41] In the case of *Ching Seng Woah @ Cheng Song Huat v Lim Shook Lin* [1997] 1 MLJ 109; [1997] 1 CLJ 375; [1997] 7 MLRH 287 the court held that the concept of matrimonial assets encompassed the following:

> The Act does not define what matrimonial assets are. We think that during the subsistence of a marriage, the expression refers to the matrimonial home and everything which is put into it by either spouse with the intention that their home and chattels should be continuing resource for their spouses and their children to be

used jointly and severally for the benefit of the family as a whole. It matters not in this context whether the asset is acquired solely by one party or the other or by the joint efforts. Whilst the marriage subsists, these assets are matrimonial assets. Such assets could be capital assets. The earning power of each spouse is also an asset.

[42] Applying *Wachtel* and *Ching Seng Woah @ Cheng Song Huat*, prima facie, the Setapak shoplot and the Titiwangsa house are the matrimonial assets of the marriage. Those properties were acquired after the marriage of the parties. The pertinent question now is whether the respondent is entitled to the division of the two properties after the decree nisi was pronounced.

[43] The statutory provision governing the division of matrimonial assets is found in s 76 of the Act. It provides clear mechanism for that purpose. Section 76 of the Act provides:

> 76 Power for the court to order division of matrimonial assets
>
> (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.
>
> (2) In exercising the power conferred by subsection (1) the court shall have regard to:
>
> (a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets or payment of expenses for the benefit of the family;
>
> (aa) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family;
>
> (b) any debts owing by either party which were contracted for their joint benefit;
>
> (c) the needs of the minor children, if any, of the marriage;
>
> (d) the duration of the marriage,
>
> and subject to those considerations, the court shall incline towards equality of division.
>
> (3) (Deleted)
>
> (4) (Deleted)
>
> (5) For the purpose of this section, references to assets acquired during the marriage includes assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by the joint efforts.

[44] Section 76 gives the power to the court to order for the division of the matrimonial assets based on the contribution of the parties, whether the contested asset is acquired by both party's joint effort of the sole efforts of one

party. We agree with the High Court case of *Choy Yoke Ying v Yong Yook Seng & Anor* [2004] MLJU 772; [2004] 8 CLJ 105; [2004] 2 MLRH 394 where Faiza Tamby Chik J observed:

> Section 76 of Act 164 deals with division of matrimonial assets. Section 76(1) and (2) cover situations where there is a direct contribution by one spouse. Even then the direct contribution does not entitle her to equal distribution. The court is only enjoined to lean towards equal division. That must mean that even if the wife's contribution is direct, the court should not order equal division automatically, but leans towards equality. How much the court leans must surely depend on the nature and extend of the contribution, and all the circumstances of the case. It goes without saying that the discretion vested in a judge of the family court is to do 'rough justice' between the parties, as there is no measure which can fit all marriages. The Act provides a guideline as to the range of that discretion. Section 76 (3) and (4) govern the situation where the wife's contribution is indirect (looking after the home and child).

[45] Notwithstanding the fact that *Choy Yoke Ying* was decided before the amendment to the Act, vide Act 1546 commencing 15 December 2018, we take the view that the parties' contribution remains the important and paramount consideration in s 76.

[46] What can be understood from s 76 is that the claimant seeking for an order in respect of the matrimonial asset of the marriage must prove that firstly, the asset in dispute is a matrimonial asset; and secondly that he/she has made contribution in the acquisition of the matrimonial asset.

[47] Also, with regard to 'matrimonial asset', the claimant must prove that the contested assets are acquired by the parties during the subsistence of the marriage and that it is acquired for the enjoyment and or continuing resources of the spouses, their children or the family as a whole.

[48] It is settled law that he who asserts must prove. Hence under ss 101 and 102 of the Evidence Act, the appellant bears the burden to prove that the Setapak shoplot and the Titiwangsa house are matrimonial assets and she made contribution towards the acquisition of the property.

[49] As the parties in this appeal are confining themselves on the issue of the division of the matrimonial assets, we will not consider the degree of responsibility which the court may apportion to each party for the breakdown of the marriage as this issue is only relevant to the assessment of maintenance under s 78 of the Act.

The Setapak shoplot

[50] We will now consider the evidence pertaining to the Setapak shoplot. It is not disputed that the marriage was registered on 26 July 1996. The appellant bought the Setapak shoplot on 13 June 1997. However due to financial problems he sold the Setapak shoplot to Hemraj on 22 October 1998. This property was then transferred to Mahalaxmi on 8 January 2014.

[51] It was not shown the purpose of the acquisition of the Setapak shoplot. However, since the parties were at that time staying with the appellant's parents, it can be assumed that the purpose is purely economic intended to benefit the family.

[52] When the property was sold in 1998, the parties were married for about two years. While, it cannot be disputed that the respondent did contribute to the acquisition of the Setapak shoplot by looking after the home and caring for the appellant and his parents (under s 76(2)(aa) of the Act), in view of the short period of time from the date of acquisition to the date of the disposal of the asset, such contribution was minimal.

[53] The appellant's explanation that the sale of the Setapak shoplot was due to his financial problem is reasonable. Furthermore, notwithstanding the strained relationship between the respondent and the family of the appellant after the marriage ceremony in India, there is no evidence that the appellant was contemplating divorcing the respondent at that material time. We also take into consideration that the Setapak shoplot has been sold for 19 years as of the date of this proceeding to, and now remain as an asset of a separate legal entity (Mahalaxmi) who was not named in this proceeding. Hence, despite the fact that the Setapak shoplot was sold to a company related to the appellant, there is no evidence of mala fide on the part of the appellant in selling the Setapak shoplot.

[54] Based on the aforesaid reasons, we are of the opinion that the learned HCJ was plainly wrong when she ordered for the division of the Setapak shoplot.

The Titiwangsa house

[55] At the risk of being repetitive, it is to be noted that the Titiwangsa house was purchased by the appellant on 18 July 2008. In 2013 the appellant and respondent moved into the Titiwangsa house. On 21 November 2009, the appellant sold the Titiwangsa house to Hemraj. Subsequently, it was sold to Mahalaxmi on 8 January 2014.

[56] The appellant relied on the following facts to support his contention that the Titiwangsa house was not a matrimonial asset of the marriage:

(a) the deposit of RM500,000 for the Titiwangsa house was paid by his mother. The appellant claimed that his mother had sold one of her property which was inherited from her husband and used the proceed of sale to pay for the deposit;

(b) the Titiwangsa house was purchased under the name of the appellant as instructed by his elder sister Vinitia and his mother hoping that he was able to secure a loan for the said purchase;

(c) the monthly instalment payment for the Titiwangsa house was paid by the appellant's sister, Sudha. The appellant claimed that he was not capable of making the monthly instalment of RM10,283 per month;

(d) the Titiwangsa house was sold to Hemraj on 21 November 2009;

(e) the Titiwangsa house was sold to Mahalaxmi on 8 January 2014; and

(f) the Titiwangsa house is now registered under Mahalaxmi, a separate legal entity.

[57] Conversely, the respondent submitted that the Titiwangsa house is a matrimonial asset based on the following facts:

(i) she had been supporting the whole household, taking care of the appellant's family including cooking vegetarian food, looking after child of the marriage, taking care of the appellant during his treatment for cancer including preparing special food and detoxifying juices and preparing foods for the visitors;

(ii) she had also worked at the Klinik Pergigian Genting where the appellant was practicing as a dentist. She was paid RM5,000 per month. It was also proven that Klinik Pergigian Genting is under Hemraj and her salary was paid by Hemraj. Notwithstanding the appellant's allegation that the respondent was inefficient when working at the clinic (which resulted in him having to supervise her work) and that she only worked on short working hours, the fact is the respondent did contribute to the family and this was not credibly denied by the appellant. In fact, in his answer to the petition, the appellant stated that the payment of the respondent salary, which he kept, was for the purposes of running the household;

(iii) the financial statement of Hemraj for the year 2014 shows that 'other receivable and deposit (under current asset)' in its balance sheet had increased from RM6,280 to RM3,730,235. This is the benefit received by Hemraj from the disposal of the Setapak shoplot and the Titiwangsa house. The sum of RM3,730,235 which was placed under the cash flow of Hemraj for financial year of 2014–2015 is the evidence that this amount was received by Hemraj as transfer of the Setapak shoplot and the Titiwangsa house from Hemraj to Mahalaxmi;

(iv) further to the fact in para (iii) above, the appellant agreed that, as a director of Hemraj, he had received the sum of RM1,754,429 as dividend, which were proceeds for the transfer of the Setapak shoplot and the Titiwangsa house;

(v) notwithstanding the appellant's contention that the deposit for the Titiwangsa house came from his mother, the respondent submitted that there was no documentary proof that the deposit was actually paid by his mother. Likewise, despite the two payment receipts of RM10,283 for the monthly instalments of the Titiwangsa house' loan by the sister, there is no other proof was produced to show that the sister paid the housing loan before it was sold to Hemraj;

(vi) after the incident at the KLIA upon her arrival from India, on 23 February 2015 when the respondent and the child returned to the Titiwangsa house, the appellant did not allow the respondent and the child to enter the Titiwangsa house because according to the appellant he was no longer staying there, but at the Sri Pelangi apartment. However, after sending the respondent and the child to the said apartment, the appellant did not stay with the respondent at the apartment, but instead returned to the Titiwangsa house;

(vii) the appellant used the Titiwangsa house address in his correspondences, police report and the cause papers in this proceeding including his affidavit. In fact, the appellant stayed at the Titiwangsa house during the trial; and

(viii) Mahalaxmi was incorporated on 22 November 2013 and less than two months later, the Titiwangsa house was sold to Mahalaxmi on 8 January 2014.

[58] Whether or not the Titiwangsa house is a matrimonial asset must be determined from the facts that was presented before the court. The parties gave diametrically different versions regarding the status of the Titiwangsa house. Hence, it is trite that the trial judge, as a trier of facts, having the audio-visual advantage in assessing the credibility and veracity of the evidence of the witnesses, was in a better position to make a finding of fact on this issue. The appellate court should exercise restraint in interfering with the finding of fact of the trial judge.

[59] Be that as it may, since an appeal is to be treated as a continuation of the trial, we have taken liberty of examine the evidence of the witnesses as recorded in the record of appeal to ascertain whether the learned HCJ had erred in her finding.

[60] The first indication that the Titiwangsa house is intended to be the matrimonial asset of the marriage can be seen from the fact that it was bought under the name of the appellant. While this fact is not disputed, there are doubts as to whether the mother and sister did contribute to the acquisition of the property. There is no documentary proof that the mother paid the deposit of RM500,000. While only two receipts were produced by the sister to show that she did pay for the monthly instalment, there is no plausible explanation why she could not produce the documentary paper trail to support her claim that she contributed to the acquisition of the property.

[61] To the contrary, the respondent's contribution to evidence her contribution to the welfare of the family by looking after the home or caring for the family have been proven and accepted by the learned HCJ. Based on the facts discussed in para 57(i) to (viii) above, we are of the view that the learned HCJ had directed her mind to the relevant facts supporting the inference that the Titiwangsa house was the matrimonial asset of the marriage. There is no misdirection either on law or fact on this issue.

Resulting trust

[62] This brings us to the new issue raised by us in this appeal namely whether the respondent's cross-petition based on resulting trust is competent when the parties who are allegedly holding the properties on trust ie Hemraj and Mahalaxmi are not named as parties in the petition.

[63] This issue relates to the basic principle of law that the litigation process must be taken by and against a correct party. A party who lacks locus standi to bring an action risks the possibility that his claim could be struck out. Similarly, if an action is instituted against a wrong party, the claim may be also be struck out on the basis that he is not a correct party, hence no remedy that be sought against that party.

[64] In the context of this appeal, the importance of this principle is founded on the nature of the claim by the respondent as reflected in para 51 of the answer to petition and cross-petition. In this paragraph, the respondent pleaded that:

> 51. Responden mendapati bahawa Pempetisyen telah secara *mala fide, memindahmilik hartanah-hartanah milikannya atau milik syarikatnya kepada keluarganya atau syarikat milik keluarganya untuk menghindar atau menghalang Responden dari menuntut atau mendapatkan haknya kepada harta sepencarian* Pempetisyen dan Responden. Pempetisyen dengan niat untuk mengecewakan hak Responden mengatur pelupusan asetnya sedemikian kepada keluarganya atau syarikat milik keluarganya. *Hartanah-hartanah tersebut sebenarnya adalah dipegang amanah oleh keluarga atau syarikat milik keluarganya bagi pihak Pempetisyen dan Responden*. (Emphasis added.)

[65] There are two aspects of the respondent's pleaded case in para 51 ie:

(i) that the appellant had, acting mala fide, transferred the Titiwangsa house to Hemraj in order to prevent the respondent from claiming her share on the property; and

(ii) that the Titiwangsa house is held on trust by Hemraj and/or Mahalaxmi on behalf of the appellant and respondent.

[66] Taking item (ii) first, the respondent is making a specific allegation that Hemraj and/or Mahalaxmi is holding the Titiwangsa house on trust on behalf of the parties in this action. It is not disputed that both Hemraj and Mahalaxmi are two companies which are incorporated by the appellant and his family members. The two companies are in fact two separate entities from the appellant. In this respect, in stating the obvious, NH Chan JCA in *Lee Eng Eaw (as director of Lee Guat Chew & Co Sdn Bhd) v Mary Lee (as executrix of the estate of Low Ai Lian) & Ors* [1999] 3 MLJ 481; [1999] 3 CLJ 143; [1999] 1 MLRA 302 states:

> One of the first things a law student learns is that a limited company has a separate legal personality of its own. It can only sue and be sued on its own name. And here we have a case of a company being sued, not in the name of the company, but in the name of one of its directors by people who are not even members of the company.

[67] The pertinent issue here is whether the respondent's claim of resulting trust is competent when Hemraj and Mahalaxmi are not cited as party in this proceeding. The answer to this question can be found in the case of *Tenaga Nasional Bhd v Majlis Daerah Segamat* [2022] 2 MLJ 119; [2022] 2 CLJ 497; [2022] 2 MLRA 334 cited by the appellant thus:

> [20] The general rule is that the court has no jurisdiction over any person other than those brought before it and no order can be made for or against or bind a non-party before a proceeding.
>
> [21] There is a plethora of authorities to support the proposition. Reference can be made to a few decisions. This general principle was stated by Seah FCJ in a Federal Court case *Kheng Chwee Lian v Wong Tak Thong* [1983] 2 MLJ 320 in the following words:
>
> > In our judgment, the court below has no jurisdiction inherent or otherwise, over any person other than those properly brought before it, as parties or as persons treated as if they were parties under statutory provisions (*Brydges v Brydges & Wood*; *Re Shepard and Coleman*). The terms 'judgment' and 'order' in the widest sense may be said to include any decision given by a court on a question or questions at issue between the parties to a proceeding properly before the court (see para 501 of *Halsbury's Law of England* (4th Ed) Vol 26 at p 237)
>
> [22] In *Brydges v Brydges & Wood* (1909) P 187 which was referred by the Federal Court in *Kheng Chwee Lian v Wong Tak Thong*, Farwell LJ, at p 191 stated as follows:

> But the court has no jurisdiction, inherent or otherwise, over any person other than those properly brought before it as parties or as persons treated as if they were parties under statutory jurisdiction (eg person served with notice of administration decree or in the same interest with the defendant appointed to represent them), or persons coming in and submitting to the jurisdiction of their own free will, to the extent to which they so submit (eg, creditors of a bankrupt executor, who has carried on business under a power in the will, coming in to claim against the testator's estate in order to obtain subrogation to the executor's right of indemnity). But the courts have no jurisdiction to make orders against persons not so before them merely because an order made, or to be made, may or will be ineffectual without it. Even in the case of an injunction, Lord Eldon says in *Inveson v Harris* (1802) 7 Ves Jun 251, 256: I have no conception, that it is competent to this court to hold a man bound by injunction, who is not a party in the cause for the purpose of the cause. The old practice was that he must be brought into court, so as according to the ancient laws and usages of the country to be made a subject matter of the writ.

[68] In this case, the respondent pleaded 'resulting trust' against Hemraj and Mahalaxmi when the two companies are not parties to this proceeding. Any order made against the two companies with regard to the issue of resulting trust would definitely contravene the rule of natural justice. Based on this ground alone, we are of the view that any declaration or order of resulting trust by the respondent against the two companies is incompetent and should not be allowed.

Mala fide

[69] Be that as it may, in para 51 of the cross-petition, the respondent also alleged mala fide on the part of the appellant in disposing the Titiwangsa house with the intention of depriving the respondent of her share in the said house. Generally, mala fide means bad faith and in law it can be inferred when there was absence of care, caution and proper sense of responsibility.

[70] In determining this issue, the following facts are relevant:

(a) the strained relationship between the respondent and appellant right from the beginning of the marriage ceremony in India which shows lack of harmony and mutual respect among the family members of the respondent and the appellant. After the respondent had moved to Malaysia, she faced constant neglect and was treated differently from the rest of the family. She was treated like a maid without much emotional or financial support from the appellant. She was treated badly by the appellant's sister which had culminated in a fight between them with the appellant taking no steps to protect her. Faced with these circumstances, the respondent had also attempted to commit suicide by taking excessive pain killers;

(b) against this backdrop, the appellant had sold the Titiwangsa house to Hemraj on 21 November 2009;

(c) the appellant had reached out to the respondent's sister ('PW1') seeking her assistance to resolve the parties' marital problem. PW1, in her witness statement narrated subsequent to the appellant's request, she came to Malaysia in the end of 2013 but she had been supportive of saving the marriage of the parties; and

(d) again, in the midst of the marital problems between the appellant and the respondent, Mahalaxmi was incorporated on 22 November 2013. Less than two months later, the Titiwangsa house was sold to Mahalaxmi on 8 January 2014.

[71] From the above chronology, we find evidence of mala fide on the part of the appellant when the Titiwangsa house was first sold. From the evidence, reasonable inference can be made that the disposal of the Titiwangsa house was made when the appellant was well aware of the problem with the respondent. It must be emphasised that the disposal of this house was made unilaterally by the appellant to a company, whose director is related to him. Further, it is pertinent to note the appellant continue to stay in the Titiwangsa house despite the fact that he had rented the Sri Pelangi Apartment and that the respondent was asked to stay in the said apartment with the child of the marriage. The disposal of this property was done by the appellant without any sense of responsibility towards the welfare of the respondent and the child.

[72] For the aforesaid reason, we have no doubt that, the respondent had shown that the appellant had sold the Titiwangsa house with mala fide.

Whether the learned HCJ was correct in ordering the division of the Titiwangsa house

[73] With respect to the Titiwangsa house, the learned HCJ ordered that the appellant to pay the respondent a sum equivalent to 50% of the current market value of the Titiwangsa house as at the date of the decision on 11 February 2022.

[74] Learned counsel for the appellant submitted that under s 76 of the Act, the court only has discretion:

(a) to divide the property, share between the parties or award a sale of the property and divide the proceeds of the sale; or

(b) in the event the court orders a sale of the property, this would be done at the current market price.

[75] It was also submitted that the learned HCJ had erred when she ordered the appellant pay 50% of the market value of the Titiwangsa house on the following:

(a) the Titiwangsa house was sold around 13 years prior to order of the learned HCJ herein;

(b) the Titiwangsa house had been sold to Mahalaxmi, hence, now has remained an asset of a separate legal entity;

(c) there is no order to set aside the sale of the Titiwangsa house by the appellant to Hemraj and later from Hemraj to Mahalaxmi;

(d) both Hemraj and Mahalaxmi are not parties in this proceeding; and

(e) it is unfair and oppressive to the appellant to be ordered to pay the respondent 50% of the current market value of the Titiwangsa house.

[76] The appellant further submitted that only when the court had ordered for the sale of the Titiwangsa house can the division can be made based on the current market value of the property. In summary, the appellant contended that the order made by the learned HCJ in respect of the Titiwangsa house was not within the ambit of s 76.

[77] Firstly, under s 76 of the Act, the court is empowered to make the following order in respect of matrimonial assets:

(a) to order the division between the parties of any assets acquired by them during the marriage; or

(b) the sale of any such assets and the division between the parties of the proceeds of sale.

[78] In our view, s 76 grants wide discretion to the court to determine and mould the appropriate order with respect to the matrimonial assets. There is no single order that fits all cases. Hence each case must be decided based on its own peculiar facts and circumstances. In our respectful view, s 76 does not confine the division of the asset based on the current market value of the property only in cases where the court orders that the property is to be sold. Division of the asset based on current market value can still be made, without the order for sale of the asset, if justice of the case warrants such an order.

[79] We find support from the following cases. In the case of *James Jemut Masing v Fiona Frances Masing Nee Henderson* [1994] MLJU 531; [1994] 2 CLJ 390; [1994] 1 MLRH 211, Chong Siew Fai J (as he then was) ordered that the division of husband's Native Customary Right lands to the wife (notwithstanding the fact that the wife, being a New Zealander, is not entitled to be registered as co-proprietor) and that the wife's share to be paid out to her

in cash. And in *Koay Cheng Eng v Linda Herawati Santoso* [2008] 4 MLJ 863; [2008] 4 CLJ 105; [2008] 1 MLRA 230 the Court of Appeal affirmed the decision of the High Court which ordered that the wife to be paid 20% of the net value (excluding a term loan and overdraft) of two properties registered under a company where the wife had 10% shares.

[80] In the present case, we have found that the appellant had sold the Titiwangsa house to Hemraj with mala fide. Considering the fact that the appellant is no longer the registered owner of Titiwangsa house and in the interest of justice, it is just and appropriate that the respondent be entitled to 50% share in the said house and the appellant to pay the respondent a sum equivalent to 50% of the current market value as at the date of the decision of the learned HCJ ie on 11 February 2022. We agree with the learned HCJ in this respect.

[81] Based on the aforesaid reasons, we find that this appeal should be allowed in part. For the reasons stated above, we find appealable error in the learned HCJ's decision with regard to the Setapak shoplot, hence the said order is hereby set aside. However, the appellant's appeal against order regarding the Titiwangsa house is devoid of merit. The learned HCJ was not plainly wrong in her decision in respect of the Titiwangsa house. As such, this part of the appeal is hereby dismissed, and the decision of the learned HCJ is affirmed. In view of the outcome, where the appeal vis a vis the Setapak shoplot is allowed, and vis a vis the Titiwangsa house is dismissed, we exercise our discretion and make no order as to costs for this appeal.

High Court's decision set aside with regard to the Setapak shoplot; decision with regards to the Titiwangsa house affirmed.

Reported by Ashok Kumar